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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re HAILEY D., et al.,

Persons Coming Under the Juvenile Court Law.

B184741

(Los Angeles County  
Super. Ct. No. CK59347)

LOS ANGELES COUNTY DEPARTMENT OF  
CHILDREN AND FAMILY SERVICES,

Plaintiff,

v.

KIMBERLY D.,

Defendant and Appellant;

MICHAEL L., et al.

Defendants and Respondents.

APPEAL from an order of the Superior Court of Los Angeles County, Marilyn K. Martinez, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Leslie A. Barry, under appointment by the Court of Appeal, for Defendant and Appellant.

Vincent W. Davis and Dia S.D. Rogers for Michael L.

No appearance for Donald H.

## **INTRODUCTION**

The juvenile court declared appellant Kimberly D.'s two children to be dependents of the court. It removed them from her custody, ordered reunification services to be provided to her, and placed the children in the custody of their respective nonoffending fathers. On this appeal, Kimberly D. (Mother) only challenges the trial court's order placing the children with their fathers. She contends that order must be reversed "because there was clear and convincing evidence that placement decision would be detrimental to the children." (Capitalization omitted.) We disagree and therefore affirm the order.

## **FACTUAL AND LEGAL BACKGROUND**

On June 8, 2005, the Department of Children and Family Services (Department) filed a Welfare and Institutions Code section 300<sup>1</sup> petition in regard to Mother's two children: six and a half year old Hailey D.<sup>2</sup> and five-year old Darrell H.<sup>3</sup> Michael L. is Hailey's father and Donald H. is Darrell's father.

At the July 6, 2005 jurisdictional hearing, the court sustained the petition, primarily based upon Mother's history of substance abuse.<sup>4</sup> Each child's father was present at the hearing. Represented by separate counsel, each requested that his child be placed with him. Mother opposed the requests, as did counsel for the

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<sup>1</sup> All statutory references are to the Welfare and Institutions Code.

<sup>2</sup> Hailey D. was born in December 1998.

<sup>3</sup> Darrell H. was born in July 2000.

<sup>4</sup> Because Mother does not challenge the trial court's judgment declaring her children dependents of the juvenile court, there is no reason to recite in detail the evidence that supports the court's jurisdictional findings.

two children. The court continued the matter to July 18 so that Department could prepare a supplemental report on the custody issue. In the interim, the two children were placed with their maternal aunt.

On July 18, 2005, the court conducted a contested dispositional hearing. The issue was whether the two children, whom the parties stipulated had a close relationship with each other, should be placed in the custody of their respective fathers.

The three parents live near each other in the San Fernando Valley. Michael L. lives in Studio City; Donald H. lives in Reseda; and Mother lives in Valley Village. The maternal aunt lives in Newbury Park in Ventura County.

Darrell H. testified. He and Hailey D. were then living with their aunt. Hailey D. took care of him as they grew up. He enjoyed his visits at his father's home, often playing with Donald H.'s two stepchildren. Darrell H. considers those two boys his best friends. When asked "If you can live with anyone in the whole world, who would you want to live with?," Darrell H. responded his father. Darrell H. testified that he would be sad if he no longer lived with his sister Hailey D.<sup>5</sup> but it would be "okay" if they were able to visit each other.

After Darrell H. completed his testimony, Mother's attorney sought to call Hailey D. to testify. The court requested an offer of proof. Counsel responded: "[Hailey D. would testify that] she's upset to be separated from her brother [Darrell H.], disturbs her to be separated from her brother. She prefers to live together with him with [their aunt] if she cannot be placed with her mother." The court ruled that Hailey D. would "not be giving testimony. It is not her decision as to where it is she wants to live, given her age." The court stated it could consider

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<sup>5</sup> In an interview conducted with the social worker the prior week, Darrell H. stated "he wants to be with his sister Hailey and he is sad when they are not together."

Hailey D.’s wishes as set forth in the offer of proof but that her desires were not “sufficiently probative [evidence] to have her come and give testimony at her age and use the court’s time.”

Lisa R., the children’s maternal aunt, testified. Since the children began to live with her approximately five weeks earlier, Michael L. had had five visits with his daughter Hailey D., three of which were overnight. Lisa R. testified that Hailey D. looked forward to the visits with her father. Donald H. had had two overnight visits with his son Darrell H. Lisa R. explained that on one occasion, the two fathers drove to her house together to pick up the children and, on another occasion, they drove separately but met in front of the house to pick up their children.

According to Lisa R., Darrell H. told her that he did not want to go on the visits with his father because “it’s boring” and “he wants to be with his sister [Hailey D.]” One time Darrell H. became upset when he could not go with Hailey D. to visit her father. Lisa R. further testified that the children have “said that they both want to stay with, live with their Mommy and that they do not want to live apart.” When Lisa R. was questioned “[W]hat effect do you think it will have on the children to be separated?,” the court sustained the objections of “speculation” and “no foundation” interposed by the fathers’ attorneys.

Mother testified that she believed the children would be harmed by living separately from each other. In her opinion, Darrell H. “would suffer the most” because “[h]e looks [to] his big sister for everything.” Mother further testified that the children should not be placed with their fathers because the fathers had had only sporadic contact with the children prior to the initiation of the juvenile court proceedings.

Department, in its supplemental report and argument to the trial court, argued against placing the children with their fathers. Its supplemental report

concluded: “The children appear to be very attached and bonded to each other and separating them at this time would be detrimental to both children. Both fathers appear[] to be able to care for their own child, however, neither father has been a constant part of their child’s life. Over the last several year[s], their visits have been inconsistent. The children appear to be well adjusted in their current placement with [their] maternal aunt[.]”

The trial court found a substantial danger existed to the children were they to remain with Mother and therefore removed them from her custody. (Mother does not challenge that ruling.) The trial court directed Department to provide reunification services to Mother. In regard to the only issue raised on this appeal -- the propriety of placing the two children in the custody of their respective fathers -- the court explained:

“As to placing these children to the custody of their fathers, there isn’t any evidence that I heard these fathers pose a risk to these children. Court can consider and ought to consider the sibling relationship. . . .

“I do not find that the evidence supports that there is detriment to these children to place them in different homes by clear and convincing evidence. What will happen if these children don’t live together full time? They will miss each other on a daily basis. They likely will be sad. There may be some degree of anger, at least initially.

“However, the evidence is quite clear, and I do give great credibility to Darrell and his testimony. It is fine for him to live with his father. It is fine for him for his sister to live with her father. And of course they want to visit.

“The history indicates, or the evidence supports, that these two [fathers] have a relationship such that they can, will, and actually do currently assist their children to visit one another. They come together to pick the children up. While they have visits with the children, since the children have been detained with their mother, they

have ensured that the children spend time with one another. The children are familiar with the other's father. They appear to be comfortable. . . .

"These children will live about five minutes from one another. They will be able to visit each other frequently; and, of course, they will have as frequent phone contact as they want to have. I'm confident their fathers will facilitate that. . . .

"As to Darrell, there is some evidence of tantruming at the beginning of a visit or the thought of having a visit. . . .

"And even though Darrell might have shown some angry outburst at the thought of beginning a visit, there isn't any evidence that his visits with his father did not go other than well.

". . . As these children grow and develop and become of school age, they're going to have peers. They're going to -- I don't want to say grow apart, but their interests may grow different. . . .

"I don't think it will be difficult for the children to be comfortable with the orders that I have made. I suspect that it may be difficult for their mother . . . who is very hostile towards these fathers. . . .

"It maybe . . . that the fathers did not have sufficiently constant consistent contact with their children, but the evidence is clear that they can properly parent their children. Most importantly, that they will assist these children to have constant and frequent contact.

"One additional comment. Back to Darrell's testimony. That I find he will be living with his [step]brothers, who are Darrell's best friends. They are the sons of his father. I think that is significant evidence."

The court directed Department to provide family maintenance services to the two fathers and ordered: "[A]ll the parents shall cooperate to assist these children to have visits with their mother and one with one another."

This appeal by Mother follows.<sup>6</sup>

## DISCUSSION

Section 361.2 governs the placement of a dependent child after removal from the custodial parent. Subdivision (a) of that statute requires the juvenile court first to determine if a noncustodial parent desires custody of the child. If so, the court is required to place the child with that parent unless it finds that placement with the parent would be detrimental to the safety, protection or emotional well-being of the child.<sup>7</sup> The principle pertinent to this case is that “[s]ibling relationships are clearly a relevant consideration in evaluating a child’s emotional well-being. Thus, under the statutory scheme governing postremoval placement decisions, a detriment finding can properly be supported by the emotional harm arising from the loss of sibling relationships even in the absence of the noncustodial parent’s contribution to the detriment. [¶] This statutory scheme is consistent with the focus in dependency law on the child, not the parent. [Citation.] . . . [A]lthough a jurisdictional finding is predicated on parental conduct, a detriment finding for purposes of deciding placement with a

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<sup>6</sup> As already noted, in the trial court Department argued against placing the children with their fathers. However, it filed no notice of appeal from the court’s ruling rejecting that position and it has filed no respondent’s brief in this court. Instead, Department has filed a letter that simply states that it “takes no position now on appeal.”

Michael L. has filed a respondent’s brief; Donald H. has not filed a brief.

<sup>7</sup> Section 361.2, subdivision (a) provides: “When a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child. If that parent requests custody, the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child.”

noncustodial parent, nonoffending parent need not be.” (*In re Luke M.* (2003) 107 Cal.App.4th 1412, 1425.)

As for the burden of showing detriment, one court has interpreted section 361.2, subdivision (a) to mean that “the noncustodial parent is presumptively entitled to custody.” (*In re Catherine H.* (2002) 102 Cal.App.4th 1284, 1292; but see *In re Austin P.* (2004) 118 Cal.App.4th 1124, 1133.) Because the noncustodial parent has both a constitutionally protected interest in custody as well as a statutory right to custody, there must be clear and convincing evidence that placement would be detrimental to the safety, protection or physical or emotional well-being of the child before the court can deny the noncustodial parent’s request for custody. (*In re Isayah C.* (2004) 118 Cal.App.4th 684, 696; *In re Luke M.*, *supra*, 107 Cal.App.4th at p. 1426; and *In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1827-1829.) Clear and convincing evidence requires a high probability of proof. It means that the evidence is so apparent that there can be no substantial doubt of the fact established. (*In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1205.)

When an appellant such as Mother challenges a finding of no detriment in placing the child with the noncustodial parent, we consider the record in the light most favorable to that finding to determine whether substantial evidence supports that finding.

Mother contends that the trial court’s order placing the children with their fathers must be reversed because “the juvenile court ignored the evidence that placement with the fathers would be detrimental to Hailey’s and Darrell’s emotional well-being.” We disagree. The trial court was well aware of that evidence. The parties had stipulated that the two children had a close relationship. Department argued against placing the children with their fathers. Darrell L. testified to his sadness upon being separated from this sister. In making its ruling, the trial court alluded several times to the sibling’s close relationship. And, as

explained below, the court referred to and distinguished the case upon which Mother now relies: *In re Luke M.*, *supra*, 107 Cal.App.4th 1412. Nonetheless, the trial court took a different approach. It relied upon Darrell H.’s testimony that he wanted to live with his father and that he could accept being separated from his sister if they were able to visit each other. In addition, the trial court correctly noted that the evidence established that the two fathers had assisted and would continue to assist the children in maintaining their close relationship by arranging joint visits and activities. “[W]e must defer to the trial court’s factual assessments. [Citation.] ‘We review a cold record and, unlike a trial court, have no opportunity to observe the appearance and demeanor of the witnesses.’ [Citation.]” (*In re Luke M.*, *supra*, 107 Cal.App.4th at p. 1427.)

Mother’s argument that “there was clear and convincing evidence that placement of Hailey and Darrell with their respective father[s] would be detrimental to their emotional well-being based upon their sibling relationship” is nothing more than a request that this court reweigh the evidence presented below. As a reviewing court, we cannot reweigh the evidence or re-determine issues of credibility and fact. That is for the trial court to do. (*In re Laura F.* (1983) 33 Cal.3d 826, 833; *In re Amy M.* (1991) 232 Cal.App.3d 849, 859-860.) Our sole role is to determine if substantial evidence supports the trial court’s finding. As explained above, the record more than amply supports the trial court’s finding that Mother failed to meet her burden to establish by clear and convincing evidence that there would be a detriment to her children if they were placed with their fathers while she received reunification services.

Mother’s reliance upon *In re Luke M.*, *supra*, 107 Cal.App.4th 1412, to support a contrary conclusion is misplaced. There, the trial court removed two children from the mother’s custody but declined to place them with their nonoffending father who lived in Ohio. The trial court found that to do so would

be detrimental to their emotional well-being because of the significant bond the children had with their two siblings who remained in California. (*Id.* at p. 1419.) On appeal, the father urged that substantial evidence did not support the trial court's finding of detriment in placing the children with him in Ohio. (*Id.* at p. 1424.) After canvassing the record in detail, the appellate court found that the "record amply supports a finding that there was a high probability that moving to Ohio would have a devastating emotional impact on [the two children]." (*Id.* at p. 1426.)

*In re Luke M.*, *supra*, is distinguishable both procedurally and factually. For one thing, in that case, the party opposing placement with the noncustodial parent successfully met her burden of establishing by clear and convincing evidence that such placement would cause emotional detriment to the two children. Consequently, the issue on appeal was whether substantial evidence supported the trial court's finding of detriment. Here, on the other hand, the trial court found that Mother failed to discharge that burden so that the issue on appeal is whether substantial evidence supports the finding of no detriment. Furthermore, in *In re Luke M.*, placing the children with the nonoffending parent meant moving them half-way across the county. Here, in contrast, Darrell H. and Hailey D. will be living a short distance from each other with fathers who intend to facilitate joint visits and activities.

Lastly, Mother urges that the "juvenile court made several errors in this case which led the court to make an erroneous placement decision." Mother has failed to present these arguments in a proper manner. An appellant's brief "must" "[s]tate each point under a separate heading or subheading summarizing the point." (Cal. Rules of Court, rules 37.3(a), 33(a), and 14(a)(1)(B).) Mother has not done so. Instead, at the end of her discussion that began with the heading that there was clear and convincing evidence that placing the children with their fathers would be

detrimental to the children, she simply goes on to discuss other claims of error. Her failure to comply with the Rules of Court constitutes a forfeiture of the claims. (*Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830-1831, fn. 4.) Nonetheless, in the interests of justice, we briefly discuss them.

Mother first urges that “the juvenile court should have given greater weight to the social worker’s opinion that separating Hailey and Darrell would be detrimental to them.” Mother offers no authority that explicitly supports a proposition which, if applied here, would require the trial court to ignore all other evidence, including Darrell H.’s testimony that he preferred to live with his father and the evidence that the two fathers would cooperate in nurturing the relationship between the two children. Stated another way, based upon the complete record presented, including Department’s opposition to placing the children with their fathers, the trial court did not abuse its discretion in crediting the evidence that establishing placement with the nonoffending fathers would not be detrimental to the children.

Mother next urges that the trial court erred when it precluded Lisa R., the children’s maternal aunt with whom they were staying, from testifying “about potential detriment from separating them.” Even were we to conclude that ruling was error -- a conclusion we do not reach -- any error was nonprejudicial. Assuming Lisa R. would have testified that in her opinion separating the children would have been detrimental, that testimony would have been cumulative to other evidence already offered to prove that point. Lisa R. had testified that the children did not want to be separated. Mother testified that she believed the children would be harmed by living apart from each other. And Department’s supplemental report advised that separation “would be detrimental to both children.” In light of the trial court’s reasoning set forth above in our statement of facts, it is not reasonably probable that had Lisa R. -- who was Mother’s sister -- testified against separation,

that the court would have reached a different conclusion. (See *Adoption of Baby Girl B.* (1999) 74 Cal.App.4th 43, 55-56.)

### **DISPOSITION**

The order appealed from (placement of Darrell H. and Hailey D. with their respective fathers) is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

HASTINGS, J.\*

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\*Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.